1960

Gayland v. Salt Lake County et al : Appellant's Reply Brief

Utah Supreme Court

In the Supreme Court of the State of Utah

GAYLAND, a Utah Corporation,

Respondent,

vs.

SALT LAKE COUNTY, STATE OF UTAH; LAMONT B. GUNDERSEN, EDWIN Q. CANNON, SR., and WILLIAM G. LARSON, Individually and as members of the Board of County Commissioners of Salt Lake County.

Appellants.

CASE
No. 9280

Appellant's Reply Brief

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STATEMENT OF FACTS

Appellant refers to the Statement of Facts as Contained in Appellant's original brief.

STATEMENT OF POINTS

POINT I. THE RECORD CONTAINS NO EVIDENCE CONCERNING WHETHER SALT LAKE COUNTY HAS OR HAS NOT ADOPTED A MASTER

PLAN FOR LAND UTILIZATION, AND THIS COURT SHOULD NOT NOW INVALIDATE SALT LAKE COUNTY'S ORDINANCES ON THE BASIS OF THE TRIAL COURT'S ERRONEOUS FINDING IN THAT REGARD.

POINT II: THE VALIDITY OF SALT LAKE COUNTY ZONING ORDINANCES IS NOT CONDITIONED UPON NOR AFFECTED BY THE ADOPTION OF A MASTER PLAN FOR LAND UTILIZATION OR FAILURE THEREOF.

POINT III: IF A MASTER PLAN IS A PREREQUISITE TO ZONING AND THE REQUIREMENTS OF A MASTER PLAN ARE NOT MET, AS CONTENDED BY RESPONDENT, RESPONDENT STILL HAS NOT BEEN PREJUDICED BY THE OMISSION THEREOF.

ARGUMENT

POINT I

THE RECORD CONTAINS NO EVIDENCE WHETHER SALT LAKE COUNTY HAS OR HAS NOT ADOPTED A MASTER PLAN FOR LAND UTILIZATION, AND THIS COURT SHOULD NOT NOW INVLIDATE SALT LAKE COUNTY'S ORDINANCES ON THE BASIS OF THE TRIAL COURT'S ERRONEOUS FINDING IN THAT REGARD.

At page 20 of its brief, respondent argues that:

> "It is conceded in the pleadings and was admitted by counsel in the court below that

> Salt Lake County has not complied with the law in regard to establishing a master plan and holding hearings thereon."

First it should be noted that respondent does not cite us to a record of any admission of appellant's counsel that Salt Lake County has failed to adopt a master plan. It is submitted that a reading of the record herein discloses no such admission.

As to whether or not appellant conceded that point in its pleadings, we refer to paragraph 9 of respondent's complaint wherein it is alleged:

> "Title 8 of Salt Lake County ordinances covering zoning and planning and the entirety thereof and in particular Chapter 8-18-1 thereof are unlawful and illegal for the following reasons."

And subparagraph "C" of paragraph 9 which elaborates on that allegation as follows:

> "The Salt Lake County Planning Commission has not adopted any master plan covering or affecting the matter of land use within this County."

Appellant's response to said allegation is contained in paragraph 7 of its answer as follows:

> "In answer to paragraph 9, defendants deny that Title 8 of the Salt Lake County ordinances or any part thereof is unlawful or illegal for the reasons alleged or for any other reason whatsoever."

It is submitted that appellant's answer was obviously intended to and did constitute a general denial of the allegations of paragraph 9 of respondent's complaint, and cannot fairly be interpreted as a concession that Salt Lake County has not adopted a master plan. Appellant is unable to locate another provision in the pleadings that might be interpreted as a concession on that point.

There being no evidence on the question of whether or not Salt Lake County has adopted a master plan, the court below erred in its finding that it had not, and this court should not now find that Salt Lake County zoning ordinances are invalid based upon that erroneous finding.

POINT II

THE VALIDITY OF SALT LAKE COUNTY ZONING ORDINANCES IS NOT CONDITIONED UPON NOR AFFECTED BY THE ADOPTION OF A MASTER PLAN FOR LAND UTILIZATION OR FAILURE THEREOF.

Utah Code Annotated, 1953, 17-27-1 provides as follows:

> "The boards of county commissioners of the respective counties within the state are authorized and empowered to provide for **the physical development** of the unincorporated territory within the county **and** for the zoning of all or any part of such unincorporated territory in the manner hereinafter provided." (Emphasis added)

It should be noted that the county commissioners are empowered to provide for two things, the physical development **and** zoning. This matter somehow escaped the respondent, for in his complaint, at paragraph 9-a, it refers to that same provision but omits the objectionable part as follows:

> "Section 17-27-1, Utah Code Annotated, 1953, grants to the board of county commissioners of the counties in the State of Utah the power to zone all or any part of the unincorporated territory within the county in the manner provided in succeeding sections."

The succeeding sections of Chapter 27 provide various ways in which the physical development of the county may be accomplished, one of which is the adoption of a master plan.

17-27-4, U.C.A. 1953, as amended, provides in part as follows:

> " . . . the master plan of a county with the accompanying maps, plats, charts and descriptive and explanatory matter shall show the county planning commission's recommendations for the development of the territory covered by the plan, and may include, among other things, the general location, character and extent of streets or roads, viaducts, bridges, parkways, playgrounds, forests, reservations, parks, airports, **and other public ways,** grounds, places and spaces; the general location and extent of public utilities and terminals whether publicly or privately owned, for water, light, power, sanita-

> tion, transportation, communication, heat and other purposes; the acceptance, widening, removal, extension, relocation, narrowing, vacation, abandonment, or change of use of any of the foregoing public ways, grounds, places, spaces, properties, utilities, or terminals; . . ." (emphasis added)

From this it seems clear that the purpose of the master plan is to provide a plan or guide for the construction and installation of public improvements. No mention is made in his section of any provisions for zoning.

17-27-6, U.C.A., 1953 as amended, provides in part that:

> "The master plan shall be available for public inspection in the office of the planning commission at all reasonable times, but its purpose and effect shall be solely to aid the planning commission in the performance of its duties."

Chapter 27 then provides still another aid to the county commissioners in providing for the physical development of the county; i.e., an official map.

Title 17, chapter 27, U.C.A., 1953, then provides in a series of sections, 17-27-9 to 17-27-19, independent of any foregoing sections except 17-27-1, that counties may make a zoning plan; that said plan should be certified to the county commission; that there should be a public hearing thereon; and after the foregoing, for the regulation of land use by zon-

ing. No mention is made of a requirement that there should first be adopted a "master plan."

17-27-20, U.C.A., 1953, makes it clear that two distinct kinds of plans are comprehended when it provides:

> "Before finally adopting and certifying any plan, **either master or zoning,** the planning commission, regional county or district, making such plan, shall submit such plan to the state planning commission for advice and recommendations." (emphasis added)

Nowhere is there any indication that one plan was intended to be dependent upon the other, but respondent would have us believe that the "Zoning Plan" is merely part of the "Master Plan," when respondent describes it as the " . . . zoning portion of the master plan." (R-18)

The remaining sections of Title 17, Chapter 27, U.C.A., 1953, provide still another means whereby the county commissioners can provide for the physical development of the county; i.e., the regulation of subdivisions.

In its brief at the top of Page 20, respondent emphasizes the words "from and after the time", followed by the unemphasized words "the county planning commission of any county, in accordance with the procedure hereinabove specified, makes, adopts, and certifies to the board of county commissioners a plan or plans for zoning the unincorporated territory within the county, or any part thereof, including both the full text of a zoning

resolution and the maps, and after public hearing thereon, then the board of county commissioners, may by resolution regulate in any portion or portions of such county . . . etc," seemingly implying that the requirement has not been met. While, as in the case of the master plan, there is no evidence on that point, appellant now asserts that all of those requirements and indeed all prerequisites to zoning regulation by the county have been met.

Respondent at page 21 of its brief points out that:

> "**Whenever** such a requirement for a master plan exists and **where it has not been met** the courts have with uniformity held that the zoning powers may not be exercised." (emphasis added)

It then cites several cases to that effect. Appellant agrees with this statement but points out that a master plan is not a requirement in Utah, that a zoining plan apparently is a requirement, and that such a plan has been adopted. The reference to the requirement of a plan in the cases cited by respondent, if they have a counterpart in Utah law, are similar to our requirement to a zoning plan and not, it is submitted, to a master plan which appellant points out is merely authorized as a guide to the planning commission and is not made a prerequisite to any action of either the planning or county commissions.

At this point, appellant will incorporate in its brief Appendix A, a reproduction of a recent dis-

cussion of the present problem which it believes will be of interest to the court.

The article being reproduced in whole, appellant will not now editorialize upon it except to say that by its submission appellant does not ask the court to legislate away whatever requirements our existing statutes impose upon us. Appellant takes the position that all that is required has been done. In addition appellant points out that the statutes under attack by respondent are to be applied to all counties of the state. If the court finds that the prerequisites to zoning are so severe that Salt Lake Couny has been unable to comply, the smaller counties of the state face an impossible burden.

POINT III

IF A MASTER PLAN IS A PREREQUISITE TO ZONING AND THE REQUIREMENTS OF MASTER PLAN ARE NOT MET, AS CONTENDED BY RESPONDENT, RESPONDENT STILL HAS NOT BEEN PREJUDICED BY THE OMISSION THEREOF.

Respondent in its brief attacked the conclusion of the trial court that:

CONCLUSIONS OF LAW

> "(A) The Board of Salt Lake County Commissioners have failed to follow the provisions of the Statutes of the State of Utah in regard to the adoption of a master plan for land utilization. Such failure, however, does not invalidate in total their zoning powers and

> would be grounds for setting aside a zoning action only in cases where it appeared from the evidence that the failure to adopt such master plan was to the prejudice of the instant case. The evidence submitted in this case does not establish that such failure prejudiced the substantial rights of the plaintiff herein."

Appellant points out that the provisions authorizing a master plan which respondent interprets as a necessary prerequisite to zoning provides at 17-27-6, U.C.A., 1953, as amended, in part as follows:

> "The master plan shall be available for public inspection in the office of the planning commission at all reasonable times, but its purpose and effect shall be solely to aid the planning commission in the performance of its duties."

Inasmuch as the recommendation of the planning board to the county commissioners was in respondent's favor, respondent can hardly claim that it was prejudiced by the failure of the planning commission to have before it a master plan.

Further respondent urges at the bottom of page 22 and the top of page 23 of its brief that it was deprived of a hearing and an opporunity to protest. Appellant points out that respondent did not avail itself of this opportunity at the time of the adoption of the "Zoning Plan", a more appropriate time to make such a protest, but, of course, this is another matter not in evidence.

CONCLUSION

For the foregoing reasons, appellant requests that this court now declare that a master plan is not a prerequisite to Salt Lake County's power to zone; that it affirm the trial court's conclusion that respondent has not been prejudiced by the omission of a master plan if such omission exists; and in the alternative, if it determines that a master plan is a prerequisite to zoning by Salt Lake County, that it remand the matter to the trial court for a determination concerning whether a master plan exists.

Respectfully submitted,

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APPENDIX A

November, 1960

ZONING DIGEST

THE "MASTER PLAN"—A STATUTORY PREREQUISITE TO A ZONING ORDINANCE?

David N. McBride and Richard F. Babcock

If you don't own a horse, why fret about putting the cart before it?

It is an exhilirating exercise to criticize zoning. The authors yield to no one in oneupmanship at this, the most popular spectator sport among planners and zoning lawyers. We have, however, decided to file a protest against the ground rule, the general acceptance of which is fast becoming catechism: that zoning ordinances must by legislative ukase be based upon "a master plan." The evidence is clear that more state legislators are beguiled each year with this "basic principle," or, at least, they fear to question this sanctified credo.

Before we are branded as counterrevolutionaries, plotting to defile Bassett, Haar, and the U.S. Department of Commerce, we make it clear: Zoning should be subordinate to planning, and should, therefore, both follow and serve that municipal concern. Zoning is quote a useful technique provided it is recognized as only one of a number of legal tools to implement a program for sound and pro-

gressive community growth unquote. The rub is that someone has persuaded legislators that if the phrase "master plan" (ah, there, "comprehensive") is inserted in the enabling act as a prerequisite to zoning, the rest of the job is a snap. Even the most benighted local citizenry cannot fail then to incorporate the Good, the True, and the Beautiful into its zoning ordinance. This, of course, is fiddle-faddle. Personally, we would rather sweat and groan with a group of citizens who, having never heard of planning, want a regulatory ordinance to control simple matters like billboards, septic tanks on small lots, and strip business development than waltz with that sophisticated band which is confident that once it adopts a plan which it characterizes as "master" it must follow that the subsequent zoning ordinance can only be perfect.

If there are meaningful planning principles, zoning must be based upon them. The first and most painful step, however, is to enunciate those principles; not to assume them and then to make that unchallenged premise a legislative prerequisite to the adoption of a regulatory ordinance. The goal more appealing to us should be to give one leg up to that community which dares to **explain** in its zoning ordinance what it means by planning, but not to grant each Thomasville, Dixon, and Harrisburg the aura of respectability by permitting it to veneer its regulatory ordinance by codifying a brace of Zip-a-toned maps, provided they are labeled "master plan."

We propose that all state zoning enabling acts abolish (repeat: abolish) the requirement

that a zoning ordinance be based upon a master plan. Instead, we want to substitute the following: (1) The preamble to each zoning ordinance **must** state whether or not the community has a plan (call it what you like) upon which the ordinance is based. (2) If the preamble states that such a plan does exist, it **must** then also state what is encompassed by the plan, its precise objectives and its principles, the relevant documents which substantiate the plan, and where copies of these documents may be examined by interested parties. Before we note the unmistakable advantages of such a revisionary proposal, it might be well to examine the prospect before us.

The Standard State Zoning Enabling Act of the U.S. Department of Commerce is the progenitor of the mandatory dogma,[1] although it refers to "comprehensive plan," not "master plan," about which nicety more later. From that source the more enlightened jurisdictions drew their statutes. The Connecticut statute is illustrative of one branch of the family. It requires that zoning regulations "shall be made in accordance with a comprehensive plan." The statute does not define the phrase. (Apparently to do so would be to insist upon footnoting the Ten Commandments.) This omission is convenient; another section of the same general title of the Connecticut statute provides that the plan commission "shall prepare, adopt and amend a **plan of development** for the municipality." (Emphasis added.) Elsewhere in the same title the unmodified term "Plan" is used. Use of these varying but similar terms has, as any fool could see, led

the courts to engage in judicial mah-jongg. Cf. "Levinsky v. Zoning Comm'n of City of Bridgeport," 127 A.2d 822 (1956) and "Couch v. Zoning Comm'n of Town of Washington," 106 A.2d 173, 176 (1954). It was predictable that a 1959 comprehensive amendment to the Connecticut statute did not define the term.

This same lighthearted practice has been followed in the Michigan statute, which uses substantially equivalent terms, most of which are not defined. The county, the township, and the city and village enabling acts each provide that the zoning ordinance must be based upon or be in accordance with a "plan" designed to promote enumerated objectives of zoning. The critical term is not defined. The Michigan Plan Commission Act required a "master plan," a term left undefined, and no specific mention or reference is made to the intended relationship (if any) between the planning "master plan" and the "plan" which must underlie a zoning ordinance. Likewise, the county and the cities and towns enabling acts of Virginia require the zoning ordinances of these governing bodies to be related to a "zoning plan" and to a "comprehensive plan," respectively. Neither term is defined.

It may be that the confusion which developed from the term "comprehensive plan" is, as Hugh Pomeroy suggests, due to a misinterpretation of the purpose of the drafters who intended no more than that a zoning ordinance be (a) comprehensive and (b) "reasonable" in the constitutional sense.[2] If this were where the matter stood, there could be no serious objection to such an innocuous

condition precedent except from semanticists and conscientious draftsmen. We suspect, however, that Mr. Pomeroy rationalizes the intentions of the drafters with greater credit than is appropriate.[3] More recent legislative developments indicate that the planners did intend something more specific, and, in light of some unsatisfactory court decisions, they decided to make clear their intentions by changing the adjective from the ambiguous "comprehensive" to the purportedly more precise "master," and defining the term in the statute. All this is not too important. The significant development is that, as the term has been more specifically defined, it has also retained its place as a mandatory prerequisite to a zoning ordinance.

One example of this latter-day approach is the Indiana Planning and Zoning Act. It requires a "master plan" as a condition precedent to a zoning ordinance and defines such a plan as "a complete master plan or any of its parts such as a master plan of land use and zoning; of thoroughfares; of sanitation; of recreation, and other related matters, and including such ordinance and ordinances as may be deemed necessary to implement such complete master plan or part thereof by legislative approval and provision for such regulations as are deemed necessary in their enforcement." The Indiana Act goes on to state that the "master plan" may consist of any of 23 items from land use maps through flood control to public education demands.

The inevitable next step was to insist that the mandatory plan contain specific elements. Thus the state of Washington 1959 county

planning enabling act provides that "zoning maps as an official control may be adopted only for areas covered by a comprehensive plan containing not less than a land use element and a circulation element." (Note here the use of the term "comprehensive plan" in a context which indicates something more than Pomeroy's comprehensive zoning ordinance.)

Indications are that this latest mandatory and explicit technique will be extended to additional jurisdictions. The proposed Pennsylvania Zoning Act insists that every zoning ordinance "shall be based and interpreted on the basis of the following planning studies:

(1) Existing Land Use Map, showing the location and extent of existing land uses throughout the municipality; and

(2) Proposed Land Use Plan, showing the location and extent of planned future land uses throughout the municipality; and

(3) Thoroughfare Plan, showing all the existing streets in the municipality, the major proposed streets, indicating them as primary and secondary and as opened or unopened."

A current proposal of the Zoning Committee of the Illinois State Bar Association to amend the state planning and zoning acts provides that only after preparation of a "comprehensive plan" may a municipality undertake a zoning program. The prerequisite "comprehensive plan" is not specifically defined, but it is required to "consist of coordinated

plans for future land use including population density and intensity of use, arterial streets and highways, and may include, among other things (sic), storm or flood water run-off channels and basins, plans for public lands and improvements, open spaces and other amenities, parks, playgrounds and recreational areas, schools, offstreet parking, subdivision developments, housing standards, health and safety standards, building and construction standards, blight elimination, urban renewal and rehabilitation, conservation, streets, alleys, public service facilities, sanitation, transportation, communication and capital improvements." (Note again the use of the term "comprehensive plan.")

The notable exception to this exercise in self-hypnosis is the state of California. The California zoning enabling act expressly negates the necessity of any plan as a prerequisite to a zoning ordinance. ("This section does not require the adoption of a master plan prior to either the initiation or adoption of a zoning ordinance.") The California statute provides, nevertheless, for the adoption of plans. A 1955 amendment requires each plan commission to adopt a "master or general plan" which consists of "a map and a statement describing it and a statement covering objectives, principles and standards used to develop it; and **shall** include all of the following elements:

(a) A land use element . . .

(b) A circulation element . . .

(c) A statement of the standards of population density and building intensity

recommended for the various districts and other territorial units, and estimates of future population growth . . .

(d) Supporting maps, diagrams, charts, descriptive material and reports."

It is then provided that the "master plan" may include several named optional elements.

The California approach makes sense. It acknowledges the responsibility of the legislature (if it insists upon legislating "planning") to explain what it means by that phrase. It does not, however, insist that this historically equivocal term must be a legislative prerequisite to a regulatory ordinance. It is our view that California should have given a statutory credit to those communities who dared to disclose the relationship between their zoning ordinance and their community plan.

Our thought is to provide a legislative bridge—not a rainbow—over the chasm between zoning and planning. The structure would be usable by those communities who are willing to submit the bridge to inspection.

To say that a municipality cannot adopt a zoning ordinance unless it has a "master plan" is an invitation to prostitute the concept of planning by municipalities which, wishing a zoning ordinance, are unable or unwilling to expend the funds and energy necessary to do an adequate job of planning. If every community must have a plan before it can regulate, for example, lot sizes, location of commercial and residential uses and off-street parking, we will see (indeed, we have seen!)

a degeneration of planning.[4] Nor does it follow that a community cannot have a reasonably efficient and fair (and, therefore, constitutional) zoning ordinance unless it has a master plan, as a house can provide shelter and yet offend an elementary sense of good taste. Let us admit without the fear of undercutting a good thing, that it is possible to have a zoning ordinance which will accomplish many useful things without a pre-existing community plan. To make a plan (comprehensive, master, or general) mandatory not only encourages bastardization of planning, but also deprives the conscientious, if impecunious, municipality of the chance to have a zoning ordinance.

Our alternative may resolve this dilemma. The preamble to each zoning ordinance must state whether or not it is based upon a community plan, the optional elements of which are enumerated in the enabling act. If that statement is in the affirmative, the preamble must set forth precisely what is meant by that "plan." Such requirements indicate a legislative recognition of the significant relationship between zoning and planning. The community that adopts a zoning ordinance without a plan must make such an admission and, such admission being required by the legislature, it follows that this is a material fact in any judicial determination as to the reasonableness of that ordinance. On the other hand, if a plan is claimed, then the drafters of the zoning ordinance must disclose on the face of the zoning ordinance what they mean by that term. Being required to display their linen, they must be certain that it bears in-

spection. On this premise it is reasonable to assume they will exercise greater concern with genuine cleanliness than would be so if the statutory requirement were that no laundry shall be washed without the application of a bleach.

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1 See Bair & Bartley, "The Text of a Model Zoning Ordinance," 4 (2d ed. 1960)

2 Pomeroy, "Zoning Policies and Policy Statement," 12 Zoning Digest, 321, 323 (1960).

3 Cf. Haar, "In Accordance with a Comprehensive Plan," 68 Harv. L. Rev. 1154, 1156 (1955).

4 The Illinois Planning Act grants a municipality the power to regulate subdivisions in the unincorporated area within 1½ miles of its boundaries, provided it has an "official plan." Few Illinois planners would deny that this bait has been used as an excuse for sloppy, makeshift, irresponsible documents labeled "official plan."